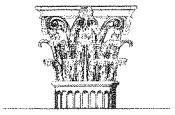

L A S H L Y & B A E R, P. C.

September 15, 2008

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Federal Communications Commission
Attn: Commission Secretary
236 Massachusetts Avenue, N.E., Ste. 110
Washington, DC 20002

Re: Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Required Under Variance ("Petition") WT Docket 08-165

To The Commission:

I am writing in connection with the above-referenced Petition which was filed with the Federal Communications Commission ("FCC") on July 11, 2008 by CTIA. I am an attorney involved in handling siting work for telecommunications carriers and site acquisition companies. I frequently handle litigation for these clients seeking judicial review of the denial of a siting request under the provisions of the Telecommunications Act of 1996 (the "Act"). See 47 U.S.C. § 332, et seq. Please accept the following comments in support of CTIA's Petition.

I. FAILURE TO ACT

It is clear from the legislative history and the wording of the Act that timing is of the utmost importance in rendering a decision on a zoning application. Under Section 332(c)(7)(B)(ii), a state or local government must act on a siting request within a "reasonable period of time" after the request is filed. If a zoning authority delays the review of an application, such actions might constitute a "failure to act" under Section 332(c)(7)(B)(v).

The problem for carriers arises due to the vagueness of what constitutes a "reasonable period of time" under the Act, and under which circumstances a delay would give rise to a cause of action under the "failure to act" language of Section 332(c)(7)(B)(v). Unfortunately in its current state the "reasonable period of time" language does not provide any protection to a carrier. From a practical standpoint, a zoning authority will always be able to argue that it acted within a reasonable period of time in ruling on an application. The local government will always be able to create reasons, pretextual or not, which allegedly provide justification for a delay in reviewing an application.

The carrier's only remedy due to an unreasonable delay is to initiate litigation under the "failure to act" language of Section 332(c)(7)(B)(v). Frequently when a carrier does file such a lawsuit, the local government will remedy the violation at the last minute, thereby rendering the issue moot after months of expensive litigation for the carrier. For example, a carrier will initiate litigation claiming that the zoning authority has failed to render a decision on its application, and that such action should entitle the carrier to approval of the application due to the zoning authority's unreasonable delay and failure to act. The local government might file a motion to dismiss claiming that none of the carrier's claims are ripe for review because the local government intends to act on the application at some point in the future, and without a denial the carrier has not yet been wronged. Alternatively, the local government might rule on the application after the carrier has already incurred the time and expense of filing a dispositive motion or preparing for trial to seek relief from the court, and then claim that the delay was justifiable due to certain pretextual reasons.

At that point, the courts are usually hesitant to find a violation of the failure to act provision of the Act because the zoning authority has cured the problem. The courts typically do not wish to become involved in a complicated factual dispute over whether a local government had good reasons for delaying a ruling on a siting request.

The carriers should not be required to file multiple lawsuits in order to force local governments to take action on an application. Due to the scenario discussed above, a carrier might easily be forced into a situation where it spends many months and substantial legal fees prosecuting litigation simply to force a zoning authority to render a final decision on an application. Once that decision is issued, the carrier is then required to file another lawsuit to address whether the decision to deny by the local government satisfies the other requirements of the Act such as the "substantial evidence" standard of Section 332(c)(7)(B)(iii). It is obviously not the intent of the Act that a carrier be forced to initiate a first round of litigation just to obtain a ruling on a zoning application, and then another lawsuit after the denial is issued to seek judicial review of the allegations allegedly supporting the denial.

A fixed timeline created by the FCC under its rulemaking authority would eliminate the problems described in the above scenario. If the timeline for a local government to act is set by rule, then there would be no need to file extensive litigation across the jurisdictions to determine under which circumstances a delay would be considered unreasonable under Section 332(c)(7)(B)(ii), or constitute a failure to act under Section 332(c)(7)(B)(v). If the timing issues are left to be defined by the courts, there will be a tremendous waste of resources which could be easily forestalled through rulemaking by the FCC. Additionally, such litigation would likely not present any clear answers to the timing issues, and the courts in each jurisdiction would reach widely varying interpretations of the timing standards currently left undefined by the Act.

A fixed time frame would also eliminate any possible "unreasonable discrimination" issues. Under Section 332(c)(7)(B)(i)(I), a local government is not permitted to unreasonably discriminate among providers of functionally equivalent services. Each time a local government takes varying amounts of time to rule on siting requests for telecommunications facilities, there is the inherent possibility that a local government is discriminating against a carrier (regardless of intention) whose application remains pending longer than another carrier's application. Even in a situation where both applications are eventually denied, the carrier whose application is denied in a timely manner will receive a head start on filing for judicial review under the Act, while the carrier whose application remains pending is precluded from seeking the court's assistance until its claims are ripened by the denial of the application. A fixed time line for ruling on siting requests would eliminate this issue as well, and it would provide a level playing field for all carriers seeking zoning approval.

The time frames of 45 days for collocation applications and 75 days for other siting requests as requested by the CTIA in its Petition are fair and reasonable. It is also reasonable for the Commission to issue a declaration that a failure to act within the specified time frames will result in the application being deemed granted. It is widely recognized in case law that a local government's failure to follow certain requirements of the Act are considered a violation which entitles the permit applicant to an injunction ordering the issuance of the permit. For example, if a local government violates the "substantial evidence" requirement of Section 332(c)(7)(B)(iii), the government is not granted a second chance to create and submit additional evidence to support its claim, rather the applicant is entitled to approval of its permit. See Sprintcom, Inc. v. Puerto Rico Regulations and Permits Administration, 553 F.Supp.2d 87 (D.Puerto Rico 2008). A violation of a clearly established time frame for the zoning authority to act should entitle the applicant to approval of its permit request.

The CTIA offered an alternative approach to the deemed granting of the application. CTIA's Petition requests that "at a minimum, the Commission should adopt a presumption that, once a "failure to act" benchmark has been triggered, the appropriate remedy is for a reviewing court to issue an injunction ordering the zoning authority to grant the siting request, unless the zoning authority can demonstrate that the delay was reasonable."

This alternative approach might still result in substantial litigation, and an automatic trigger of approval upon missing the timing deadline should be the preferred remedy. Under CTIA's alternative approach, local governments will always be able to create some pretextual reasons to explain why a delay was reasonable. In order to prove a delay was not reasonable, a carrier would need to engage in extensive discovery of factual information outside the administrative record. For example, if a local government argues that it could not rule on an application prior to

the date litigation is initiated because it was waiting on input from concerned citizens, it would be almost impossible for a carrier to prove whether this excuse was true.

An automatic trigger of approval upon a local government's violation of the timing benchmarks is the only method of eliminating the above issues. If the Commission determines the time frames suggested by CTIA are too short, a staggered time frame could be implemented. For example, a local government could be granted the right to request a short extension of the 75 day period (ex. another 15 days) for ruling on an application. Any such extension notice would need to be in writing, and it would also need to contain detailed, authorized reasons for requesting an extension in a manner similar to the "in writing" requirement of Section 332(c)(7)(B)(iii) so that a court would be able to conduct a review of the reasons supporting the extension. For example, the local government might claim the carrier neglected to submit certain information with the application as required by the local government's zoning code, or the City Council meeting scheduled to consider the application was continued to due lack of a quorum.

CTIA's request for a benchmark time frame which would define a "failure to act" under Section 332(c)(7)(B)(v) is necessary to clarify the vague wording of the Act which will likely never be resolved in a satisfactory manner by the courts.

II. FINAL ACTION

Although CTIA's Petition focuses primarily on the "failure to act" language cited above, it is also necessary to examine the term "final action" of Section 332(c)(7)(B)(v) in conjunction with the proposed rulemaking.

The recent trend in case law has created an ambiguity on whether the "final action" reviewable under the Act is the vote to deny a siting request or the subsequent written decision regarding the denial as required by Section 332(c)(7)(B)(iii). See Preferred Sites, LLC v. Troup County, 296 F.3d 1210 (11th Cir. 2002); Omnipoint Holdings, Inc. v. City of Southfield, 355 F.3d 601 (6th Cir. 2004); Laurence Wolf Capital Management Trust v. City of Ferndale, 176 F.Supp.2d 725 (E.D.Mich. 2000); Industrial Communications & Electronics, Inc. v. Town of Falmouth, No. 98-397-P-H, 1999 WL 33117159 (D.Me. June 10, 1999); and USCOC of Greater Missouri, LLC v. City of Ferguson, Missouri, 2008 WL 2065033 (E.D.Mo. 2008).

The adoption of any benchmark time frames should include a finding that the final action required within the specified time frame includes both a final ruling on the siting request from the relevant governing body, along with the issuance of the written decision required by Section 332(c)(7)(B)(iii). If the written decision is not included as part of the required action within the benchmark time frames, any rulemaking imposing a time frame regarding an application would be useless in terms of speeding up the judicial review process. For example, assume that a

zoning authority votes to deny a zoning application for a new tower within the 75-day period requested in CTIA's Petition. If the written decision is not considered part of the "final action" required within the benchmark time frame, then the zoning authority can wait indefinitely to issue a written decision after a denial vote, and the carrier's claims will still not ripen until that time for purposes of judicial review under the above-cited line of cases. See USCOC of Greater Missouri, LLC, 2008 WL 2065033 at 8-11. A carrier would still be required to file a "failure to act" lawsuit if no written decision is received in a timely manner. Such a situation would negate the intent of CTIA's request for establishing time frames, which is to create a more streamlined process for judicial review of a local government's actions in connection with a siting request.

The written decision requirement of Section 332(c)(7)(B)(iii) must either be included as part of the final action required within CTIA's requested time frames, or a separate requirement must be established specifying a time frame for issuing a written decision once a vote to deny a siting request has taken place. Such a requirement will not create a burden for local government. It is presumed that the reasons for denial of a siting request are present in the minds of the voting body at the time of the vote to deny, so it should be a simple matter to reduce those reasons to writing within a specific time period. The harm to the carrier occurs at the time its zoning application is denied, and a carrier should be entitled to prompt judicial review of a denial without having to wait an extended period for receipt of a written decision regarding the denial.

III. PROHIBITION OF WIRELESS SERVICES

CTIA's Petition requests clarification of Section 332(c)(7)(B)(i)(II), which bars decisions that "prohibit or have the effect of prohibiting the provision of personal wireless services." The issue for resolution is whether wireless service from any provider must be prohibited in order make a claim under Section 332(c)(7)(B)(i)(II), or whether preventing a single carrier from providing service in an area will create a violation of the Act.

The intent of the Act was clearly to provide competitive telecommunications services in any given area. An interpretation of Section 332(c)(7)(B)(i)(II) which requires that no carrier can be providing service in an area in order to establish a prohibition of service claim violates the intent of the Act. Such an interpretation creates a situation where the first carrier to provide services in a particular area will always be more protected under the provisions of the Act than a subsequent carrier, and such a situation was not intended by the Act. The only interpretation which fits the overall intent of the Act to provide competitive services and to prevent discrimination among carriers is the interpretation that prohibiting any single carrier from entering a market would constitute a violation of the Act.

IV. ORDINANCES TREATING EVERY SITING REQUEST AS REQUIRING A VARIANCE UNDER SECTION 253

CTIA's Petition asks the FCC to declare that any ordinance that automatically requires a wireless carrier to seek a variance is preempted as an impermissible barrier to entry under Section 253(a). This position is supportable because in many jurisdictions the standard for obtaining a variance creates an insurmountable problem.

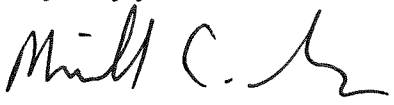
For example, in many zoning jurisdictions, an applicant for a variance is required to show that a property cannot be used for any other use in order for a variance to be granted. See USCOC of Greater Iowa, Inc. v. Zoning Board of Adjustment of the City of Des Moines, 465 F.3d 817 (8th Cir. 2006). In the case of an applicant for a telecommunications tower, this forces an applicant to show that a proposed tower site cannot be used for any other permitted use under the relevant zoning ordinances unless the variance is granted. This requirement is impossible to meet, due to the fact that it would be a very unusual piece of property which could not be used for any purpose other than a telecommunications tower. As a result, in these zoning jurisdictions it would be impossible to obtain the required variance, which creates a barrier to entry which could never be overcome.

V. CONCLUSION

The time frames for ruling on a siting request which are requested by CTIA in its Petition are both reasonable and necessary. A carrier should not be required to wait indefinitely after a siting application is submitted to receive a decision, and a local government should not be permitted to circumvent the judicial review protections of the Act simply by postponing a ruling on the application.

Additionally, CTIA's position that a single carrier should be permitted to claim a prohibition of service in a given area regardless of the level of service provided by any other carrier is also valid, as is its claim that any local ordinances requiring a variance for approval of all siting requests constitute an impermissible barrier to entry.

Very truly yours,



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